

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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HERMAN REED,

Petitioner,

v.

ISIDRO BACA, et al.,

Respondents.

Case No. 3:13-cv-00426-MMD-WGC

ORDER

This habeas matter comes before the Court on plaintiff's motion for appointment of counsel (dkt. no. 7) and his accompanying pauper application (dkt. no. 6) as well as for initial review of the amended petition (dkt. no. 5). The filing fee has been paid.

Petitioner's motion for appointment of counsel will be denied.

The Sixth Amendment right to counsel does not apply in habeas corpus actions. See *Knaubert v. Goldsmith*, 791 F.2d 722, 728 (9th Cir. 1986). However, 18 U.S.C. § 3006A(a)(2)(B) authorizes a district court to appoint counsel to represent a financially eligible petitioner whenever "the court determines that the interests of justice so require." The decision to appoint counsel lies within the discretion of the court; and, absent an order for an evidentiary hearing, appointment is mandatory only when the circumstances of a particular case indicate that appointed counsel is necessary to prevent a due process violation. See, e.g., *Chaney v. Lewis*, 801 F.2d 1191, 1196 (9th Cir.1986); *Eskridge v. Rhay*, 345 F.2d 778, 782 (9th Cir.1965).

1       The Court does not find that the interests of justice require that counsel be  
2 appointed in this case. While petitioner presents a number of claims, he has  
3 demonstrated an adequate ability in his pleadings to articulate his claims *pro se* with the  
4 resources available to him. From a preliminary review, it does not appear at this  
5 juncture that an evidentiary hearing necessarily will be required as to either the merits or  
6 a procedural defense. Moreover, while petitioner refers to *Martinez v. Ryan*, 132 S.Ct.  
7 1309 (2012), it does not appear from a preliminary review that petitioner presents any  
8 claims of ineffective assistance of counsel that were held to be procedurally defaulted  
9 by the state courts. *Martinez* pertains to circumstances under which a petitioner can  
10 establish cause and prejudice to overcome a procedural default. It does not require  
11 either appointment of federal habeas counsel or a federal evidentiary hearing in every  
12 case where counsel was not appointed on state post-conviction review. Nor does  
13 petitioner's sentence structure otherwise weigh heavily in favor of appointing counsel  
14 either in isolation or in conjunction with the remaining factors.<sup>1</sup> While almost any lay  
15 litigant perhaps would be better served by the appointment of counsel, that is not the  
16 standard for appointment. The motion therefore will be denied.

17       The pauper application will be denied without prejudice as moot. The filing fee  
18 has been paid, and the Court is denying the motion for appointment of counsel on  
19 grounds other than financial ineligibility. The pauper application in any event was not  
20 properly completed because petitioner did not attach a copy of his inmate account  
21 statement for the past six months, in addition to the financial certificate.

22       Following upon the Court's initial review, service for a response will be directed.

23       It is therefore ordered that petitioner's motion for appointment of counsel (dkt. no.  
24 7) is denied and that his application to proceed *in forma pauperis* (dkt. no. 6) is denied  
25 as moot.

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28       <sup>1</sup>Petitioner was sentenced on July 29, 2010, to 48 to 120 months and a  
consecutive sentence of 28 to 70 months, with 117 days credit for time served.

1 It is further ordered that the Clerk of Court shall make informal electronic service  
2 of this order and the amended petition upon the Nevada Attorney General as per the  
3 Clerk's current practice and that the Clerk shall regenerate notices of electronic filing to  
4 the Attorney General for all other prior filings herein.

5 It is further ordered that, given the large number of claims presented,  
6 respondents shall have ninety (90) days from entry of this order within which to respond,  
7 including potentially by motion to dismiss, to the amended petition. Any response filed  
8 shall comply with the remaining provisions below, which are tailored to this particular  
9 case based upon the Court's screening of the matter.

10 It is further ordered that any procedural defenses raised by respondents in this  
11 case shall be raised together in a single consolidated motion to dismiss. In other words,  
12 the Court does not wish to address any procedural defenses raised herein either in  
13 *seriatum* fashion in multiple successive motions to dismiss or embedded in the answer.  
14 Procedural defenses omitted from such motion to dismiss will be subject to potential  
15 waiver. Respondents shall not file a response in this case that consolidates their  
16 procedural defenses, if any, with their response on the merits, except pursuant to 28  
17 U.S.C. § 2254(b)(2) as to any unexhausted claims clearly lacking merit. If respondents  
18 do seek dismissal of unexhausted claims under § 2254(b)(2): (a) they shall do so within  
19 the single motion to dismiss, not in the answer; and (b) they shall specifically direct their  
20 argument to the standard for dismissal under § 2254(b)(2) set forth in *Cassett v.*  
21 *Stewart*, 406 F.3d 614, 623-24 (9th Cir. 2005). In short, no procedural defenses,  
22 including exhaustion, shall be included with the merits in an answer. All procedural  
23 defenses, including exhaustion, instead must be raised by motion to dismiss.

24 It is further ordered that, in any answer filed on the merits, respondents shall  
25 specifically cite to and address the applicable state court written decision and state  
26 court record materials, if any, regarding each claim within the response as to that claim.

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1 It is further ordered that respondents shall file a set of state court record exhibits  
2 relevant to the response filed to the petition, in chronological order and indexed as  
3 discussed, *infra*.

4 It is further ordered that all state court record exhibits filed herein shall be filed  
5 with a separate index of exhibits identifying the exhibits by number. The CM/ECF  
6 attachments that are filed further shall be identified by the number or numbers of the  
7 exhibits in the attachment, in the same manner as in No. 3:06-cv-00087-ECR-VPC, ##  
8 25-71. The purpose of this provision is so that the Court and any reviewing court  
9 thereafter will be able to quickly determine from the face of the electronic docket sheet  
10 which numbered exhibits are filed in which attachments.

11 It is further ordered that counsel additionally shall send a hard copy of all exhibits  
12 filed, for this case, to the Reno Clerk's Office.

13 It is further ordered that petitioner shall have thirty (30) days from service of the  
14 answer, motion to dismiss, or other response to mail a reply or response to the Clerk of  
15 Court for filing.

16 It is further ordered that, henceforth, petitioner shall serve upon respondents or, if  
17 an appearance has been entered by counsel, upon the individual deputy attorney  
18 general identified in the notice of appearance, at the address stated therein, a copy of  
19 every pleading, motion or other document submitted for consideration by the Court.  
20 Petitioner shall include with the original paper submitted for filing a certificate stating the  
21 date that a true and correct copy of the document was mailed to respondents or counsel  
22 for respondents. The Court may disregard any paper received by a district judge or  
23 magistrate judge which has not been filed with the Clerk, and any paper received by a  
24 district judge, magistrate judge or the Clerk that fails to include an appropriate certificate  
25 of service.

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1 It is further ordered that all requests for relief must be presented by a motion  
2 satisfying the requirements of Rule 7(b) of the Federal Rules of Civil Procedure. The  
3 Court and the Clerk do not respond to letters and do not take action based upon letters.

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5 DATED THIS 2<sup>nd</sup> day of June 2014.

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8 MIRANDA M. DU  
9 UNITED STATES DISTRICT JUDGE  
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